8-1700-3294 2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by
Stephen W. Cooper, Commissioner,
Department of Human Rights,
Complainant,

v

Gehling Auction Company, Inc.,
Respondent.

FINDINGS OF FACT
CONCLUSIONS OF LAW,
ORDER AND MEMORANDUM

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde on Monday, April 17, 1989, at 9:00 A.M. in the Commissioner's Room of the Fillmore County Courthouse, in the City of Preston, Minnesota, pursuant to a Complaint and Notice of an Order for Hearing dated March 3, 1989.

Andrea Mitau Kircher, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101 appeared on behalf of the Complainant. Robert R. Benson, Attorney at Law, P.O. Box 257, Preston, Minnesota 55965 appeared on behalf of the Respondent. The record closed on August 8, 1989.

NOTICE

Pursuant to Minn. Stat. 363.071, Subd. 2, this Order is the final decision in this case and under Minn. Stat. 363.072, the commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. sec. 14.63 to 14.69.

STATEMENT OF THE ISSUES

1. Whether Respondent committed reprisal in violation of Minn. Stat. 363.03, subd. 7 (1988) by initiating lawsuits against the charging parties because they filed discrimination charges against Respondent.

2. What relief should be granted to the charging parties, Winnie Wayne and Jayne Nelson, if the lawsuits constitute reprisals.

3. Whether Respondent may be enjoined from prosecuting lawsuits arising from discrimination charges filed under Minn. Stat. 363.03, subd. 1(2)(b) and (c).

Based on all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent, Gehling Auction Company, Inc., is an employer within the definition of Minn. Stat. sec. 363.01, subd. 15.

2. Respondent employed Jayne M. Nelson from August, 1984 until April 28, 1986. Respondent employed Winnie Wayne from January, 1986 until April 28, 1986. On April 28, 1988. both Nelson and Wayne were terminated for misconduct committed while on a business trip for Respondent.

3. On June 9, 1986, Wayne filed a charge of gender discrimination against Respondent. Nelson filed a charge of gender discrimination against Respondent on September 24, 1986. The Department of Human Rights (Department) served a copy of each charge upon Respondent. The charges alleged that both male and female employees had engaged in misconduct on a business trip, but that only female employees had been discharged for the misconduct.

4. At the time those charges were filed, Ms. Wayne and Ms. Nelson (charging parties) did not know that any male employee had been terminated for the same conduct.

5. John P. Tittle, an investigator for the Department, discussed the gender discrimination charges with Ron Gehling, President of the Gehling Auction Company, Inc., on several occasions during Tittle's investigation of the charges. During one of these discussions, Gehling mentioned that he was considering suing Nelson and Wayne for damages arising from the filing of those charges. At that time, Tittle advised Gehling that such conduct would be considered to be a reprisal and read Gehling the particular subsection of the Human Rights Act which prohibits reprisals.

6. On June 22, 1987 Wayne's charge was dismissed after a finding of "no probable cause" by the Department. On June 30, 1987, Nelson's charge was dismissed by the Department for the same reason. The findings of no probable cause were made because the Department found that Respondent had terminated two male employees for the same conduct that lead to the termination of the charging parties.

7. Wayne asked for reconsideration of the "no probable cause finding." On July 31, 1987, the Department affirmed its original determination.

8. Near the end of October, 1987, a Summons and Complaint was served on Wayne. The Complaint named the Gehling Auction Company, Inc. as plaintiff and Wayne as Defendant. The Complaint requested $5,000.00 for damage to plaintiff's reputation and attorney's fees expended in defending against Wayne's gender discrimination charge. A similar

Summons and Complaint was served on Nelson in early November. That Complaint named her as the defendant and requested the same relief.

9. The summons against Wayne was served by substitute service on her roommate. Wayne was shocked by and afraid of this lawsuit. She was embarrassed by having to explain to her roommate what was happening to cause a lawsuit against her.

10. Wayne hired an attorney to prepare and serve an Answer to the Complaint. She has incurred $704.10 in attorneys fees. In consulting with her private attorney and the Attorney General's office, Wayne missed 12 hours of work at $8.25 per hour for a total of $99.00. In attending the hearing of this matter, she missed 8 hours of work at time and one half for a total of $99.00. In meeting with her attorney and the Attorney General's office, Wayne drove a total of 60 miles and incurred parking expenses of $10.00. In attending the hearing, she drove a total of 260 miles. Using the mileage reimbursement figure of $.24 per mile, Wayne incurred mileage expenses of $76.80 and parking expenses of $10.00.

11. Wayne suffers physical discomfort which is aggravated by stress. She suffered such discomfort on the day of the hearing. Her sleep was disturbed from worry over this proceeding.

12. Nelson was living with her sister when a Sheriff's Deputy left a notice for Nelson to contact him. When Nelson contacted the Deputy, she was served with the Respondent's Complaint. Nelson was angered and worried by the lawsuit. That was the first time she had been sued.

13. Nelson hired an attorney to prepare and serve an Answer to the Complaint. Because her first attorney moved out of state, Nelson hired a second attorney. She has incurred a total of $174.50 in attorneys fees. In consulting with her private attorney, and the Attorney General's office, Nelson missed 9 hours of work at $10.00 per hour for a total of $90.00. In attending the hearing of this matter, she missed 8 hours of work for a total of $80.00.

14. Nelson was visibly upset at the hearing. During her employment with Respondent, Nelson felt she had a special relationship with Gehling, similar to a father-daughter relationship. When she was terminated from Respondent's employ, Nelson was angry with Gehling. Nelson contacted the Department of Transportation to complain of Respondent's alleged noncompliance with that Department's rules. She did this to make Gehling uncomfortable.

15. Both Wayne and Nelson pursued the initial charge of sex discrimination against Respondent in good faith. Both charging parties reasonably believed that the Respondent's conduct constituted gender discrimination.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction herein under Minn. Stat. 363.071, Subds. I and 2, and 14.50 (1988).

2. That the Respondent is the employer of the charging parties for purposes of Minn. Stat. 363.01, Subd. 12 and 363.03, Subd. 2(l)(a)(1988).

3. That Respondent committed reprisal in violation of Minn. Stat. 363.03, Subd. 7 by filing civil actions against the Charging Parties for exercising their rights under the Minnesota Human Rights Act.

4. Wayne is entitled to compensatory damages in the amount of $988.90; damages for mental anguish and suffering in the amount of $500.00; and $1,000.00 in punitive damages.

5. Nelson is entitled to compensatory damages in the amount of $344.50; damages for mental anguish and suffering in the amount of $500.00; and $1,000.00 in punitive damages.

6. Respondent must pay a civil penalty to the State in the amount of $500.00.

Based upon the foregoing Conclusions of Law and for the reasons set forth in the attached Memorandum, The Administrative Law Judge makes the following:

ORDER

1. That the Respondent cease and desist from its reprisal against the Charging Parties and cease and desist prosecution of its civil action against them for the charges of gender discrimination they filed.

2. That the Respondent pay to Wayne compensatory damages in the amount of $988.90.

3. That the Respondent pay to Wayne damages for mental anguish or suffering in the amount of $500.00.

4. That the Respondent pay to Wayne punitive damages in the amount Of $1,000.00.

5. That the Respondent pay to Nelson compensatory damages in the amount of $344.50.

6. That the Respondent pay to Nelson damages for mental anguish or suffering in the amount of $500.00.

7. That the Respondent pay to Nelson punitive damages in the amount Of $1,000.00.

8. That the Respondent pay a civil penalty in the amount of $500.00 made payable to, "General Fund - State of Minnesota" and sent to the Chief Administrative Law Judge for submission to the State Treasurer.

9. That Respondent pay all damages and penalties assessed by this Order within thirty (30) days of the date of this Order.

Dated this 11 day of August, 1989.

JON L. LUNDE
Administrative Law Judge

Reported: Transcript

MEMORANDUM

This case arises from the Respondent's initiation of lawsuits against the charging parties to recover damages allegedly incurred to defend against two charges of alleged gender discrimination filed with the Department. The employer's lawsuits allege that it was defamed by the discrimination charges and that it incurred actual damages (attorney's fees) in defending against the charges. The Department asserts that the lawsuits constitute reprisal.

Minn. Stat. 363.03, Subd. 7 makes reprisal an unlawful act of discrimination. Under that subpart, reprisals include, but are not limited to, any form of intimidation, retaliation, or harassment. Respondent asserts that the lawsuits are not intended to retaliate against the Charging Parties. The causes of action pursued in those suits, however, clearly relate to the sex discrimination charges filed with the Department. The Respondent's Complaints state:

> 4. That, subsequent to such termination of employment, defendant has made false accusations about plaintiff, including, but not limited to, the accusation that defendant was discriminated against by plaintiff as a result of her gender.
>
> S. That such accusations have included, but not limited to, a complaint made to the Minnesota Department of Human Rights alleging that defendant was terminated from her position with plaintiff as a result of sex discrimination by plaintiff.

Complainant's Exhibit Nos. 2 and 7.
The conduct which forms the basis of Respondent's suit is the filing of a gender discrimination charge. Respondent's suit is direct evidence of retaliation and, as such, the three-part analysis of McDonnell Douglas Corp.v. Green, 93 S.Ct. 1817 (1973), does not apply. Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986)(citing Hardin v. Stynchcomb, 691 F.2d 1364 (11th Cir. 1982).

The filing of a discrimination charge has been afforded an absolute privilege. EEOC v. Virginia Carolina Veneer Corp., 495 F.Supp. 775, 777 (W.D.Va. 1980)(citing Moran v. Simpson, 362 N.Y.S.2d 666 (S.Ct. 1974)); See also, Petteway v. American Cast Iron Pipe Co. 411 F.2d 998, 1007 (Sth Cir. 1969). Respondent has shown no ground upon which attorney's fees expended in opposing a charge of discrimination may be awarded, in the

face of that privilege. Therefore, the request for attorney's fees in the Respondent's complaint is a reprisal, violative of Minn. Stat. 363.03, subd. 7.

With regard to the defamation claim, however, more analysis is required. In National Labor Relations Board cases, state tort claims are often pursued in tandem with charges made to the N.L.R.B. Linn v. United Plant Guard Workers, 86 S.Ct. 657 (1966): Bill Johnson's Restaurants, Inc. v. NLRB, 103 S.Ct. 2161 (1983). The National Labor Relations Act differs from the Minnesota Human Rights Act, however. The protection against reprisal is broader under civil rights statutes. see, Pettway, 411 F.2d at 1006 (5th Cir. 1969). State court actions are not part of the statutory scheme in human rights cases, unlike NLRA actions. Bill Johnson's Restaurant, 103 S.Ct. at 2167.

The Courts have permitted state tort claims in response to a civil rights charge in some situations. In Greene v. Armco, Inc., 696 F.Supp. 1328 (C.D.Cal. 1988), an employer properly sued an employee for abuse of process and malicious prosecution in response to an EEOC charge. The employee filed the charge to create confusion and delay in a civil suit by the employer seeking the return of money wrongfully retained by the employee. The Court determined that the proper test for permitting a suit in response to an EEOC charge is whether a prudent attorney in the employer's position would have understood the relevant statute to deprive the employer of a remedy under state tort law for misuse of process. Greene, 696 F.Supp. at 1339. Similarly, in Pettway, the Court noted that Title VII actions did not preempt employers from vindicating reputations through state civil actions for defamation. Pettway , 411 F.2d at 1007.

The apparent conflict between the absolute privilege in EEOC v virginia Carolina Veneer and the permission to sue in Greene is resolved through a close examination of the circumstances of each judicial response. In EEOC v._Virqinia Carolina Veneer the only defamatory action complained off in the employer's suit was the charge filed with the EEOC. The Court noted that "No other defamatory writings, statements or actions were alleged in defendant's state court action. Defendant has not alleged any other basis for its state court suit." EEOC v. Virginia Carolina Veneer Corp., 495 F.Supp. at 777. In Greene, the employee's charge was filed in bad faith to block an employer's civil suit to collect money owed by the employee. The employer's suit was not based on the operative facts of the employee's civil rights charge. These circumstances indicate that a lawsuit in response to a Human Rights Act charge must have an independent basis to avoid the prohibition against reprisal. Respondent's counsel recognized this requirement in his brief statement prior to presenting the Respondent's case in chief. He referred to the suit as "an action *** based upon statements made by the complainants other than to any person in the Department of Human Rights." Transcript, at 112.

Complainant has requested that the Respondent be "enjoined" from pursuing its civil action. An Administrative Law Judge may do that if the prosecution of an action is improperly motivated; lacks a reasonable basis; and violates the applicable statute. Bill Johnson's Restaurant, 103 S.Ct. at 2170. Essentially, the question presented in this case is whether the Respondent's case lacks a reasonable basis. To resolve this issue, the Administrative Law Judge must examine the state court claim.

The United States Supreme Court stated the test to be used:

> Hence, we conclude that if the state plaintiff is able to present *** evidence that shows his lawsuit raises genuine issues of material fact, the [agency] should proceed no further with the *** proceedings but should stay those proceedings until the state-court suit has been concluded.

Bill Johnson's Restaurant, 103 S.Ct. at 2171.
The Supreme Court noted that the "genuine issue" test is the procedure for ruling on motions for summary judgment. Bill Johnson's Restaurant, 103 S.Ct. at 2171 (footnote 11).

When the only disputed issues presented are factual, the Administrative Law Judge need only determine whether the Complaints raise genuine issues of material fact. if genuine issues of material fact are raised, the administrative action must be stayed. if no issues of material fact are raised, and the law is in favor of the state plaintiff, the administrative action must be stayed. If the state plaintiff raises an issue of law which is not "plainly foreclosed as a matter of law or is [not] otherwise frivolous" the administrative action must be stayed "if there is any realistic chance that the plaintiff's legal theory might be adopted." Bill Johnson's Restaurany, 103 S.Ct. at 2172.

Defamation has three elements. The statement "must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower him in the estimation of the community." Stuempge v. Parke._Davis_& Co., 297 N.W.2d 252, 255 (Minn. 1980)(citing Restatement (Second) of Torts 558-559 (1977)). Respondent has presented only two items of evidence that its defamation cases have merit. Mr. Gehling testified that "probably six, eight" persons had made mention of having been talked to by the charging parties about Respondent's discriminating on the basis of gender. None of these persons were identified. No part of the conversations between Mr. Gehling and any of these unidentified persons was reproduced at the hearing in any form. The content of the alleged defamatory statements remains unknown. This testimony by Mr. Gehling does not establish that any genuine issue of material fact exists to be tried in state court. A mere allegation that statements were made is insufficient to defeat a motion for summary judgment. Minn. Rule Civ. Proc. 56.05 (1989); see also, Ledl v. Quik Pik Food Stores, Inc., 349 N.W.2d 529, 533 (Mich.App. 1984).

Testimony was heard from Mr. Swendra, the agent of a subsequent employer of Ms. Wayne. Mr. Swendra described a conversation held with Ms. Wayne on the occasion of Ms. Wayne requesting a payroll advance. Mr. Swendra stated that:

> There was a discussion on one occasion, and she didn't mention Gehling Auction Company. She had mentioned having a suit against a previous employer. *** She said it was a discrimination law suit that was arising out of an incident that happened. And I'm not sure of all the players. She mentioned something about that it was some male and female people involved, that they were involved in with the

> previous employer. They had done something wrong and they had gotten fired for it. She had mentioned that there was one or two males and two or three females that were involved in it. When she relayed to me that the males had gotten fired too, I made a comment that it didn't sound like a sexual discrimination case to me, because if a male got fired, it really didn't [objection made, overruled] sound like a sexual discrimination law suit to me.

Transcript, at 127-9.

This conversation does not defame the Respondent. The Respondent was not named in the conversation. No evidence indicated that the Respondent was named inferentially in the conversation. The conduct described by Ms. Wayne immediately elicited the unprompted opinion by Mr. Swendra that the conduct did not constitute sexual discrimination. Stating that a suit is in progress and expressing confidence in its success does not constitute a statement of fact that the defendant in that suit has done what is stated in the pleadings. This evidence does not show that genuine issues of material fact are yet to be resolved in the state court suit.

Because the defamation action does not raise any genuine issues of material fact, and the state plaintiff would not succeed as a matter of law on that claim, the state-court action may be enjoined. As a matter of procedure, the appropriate relief is a cease and desist order. Should the state plaintiff continue the suits, appropriate relief may be had in District Court.

The Greene test for permitting a defamation suit in response to a gender discrimination charge can be restated as "whether a prudent attorney would have understood 363.03, subd. 7 to deprive the employer of a remedy under Minnesota tort law for defamation, absent defamatory statements made to individuals other than Department of Human Rights employees." There has been no showing by Respondent, through cases or statutes, that the Subdivision 7 prohibition against reprisal does not apply to suits for defamation when the alleged defamatory statement is the human rights charge. Since Respondent did not show any reasonable ground for believing such suits are permitted, the Greene test must be resolved in favor of the Department. The state court defamation suit is a reprisal, contains no genuine issues of material fact, and would not succeed as a matter of law, hence it must not be pursued further.

Wayne and Nelson suffered actual damages for lost wages, mileage and attorney's fees in defending the Respondent's lawsuits and preparing for the hearing in this matter. The lawsuits filed against Wayne and Nelson caused mental anguish and suffering for which they should be compensated. Punitive damages may be awarded, under Minn. Stat. 363.071, subd. 2, pursuant to Minn. Stat. 549.20. Under Minn. Stat. sec. 549.20, subd. 1, punitive damages may be awarded "only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others." Respondent proceeded with civil suits against Nelson and Wayne despite an express warning from the Department that such action would be considered reprisal. Further, the evidence presented at the hearing indicates that the suits were not meritorious. Proceeding with a civil suit under these conditions is clear and convincing evidence that Respondent acted with willful indifference to the rights of Wayne and Nelson.

A civil penalty is required when Minn. Stat. sec. 363.03 is violated. Minn. Stat. sec. 363.071, subd. 2. The civil penalty must be set taking into consideration the extent and seriousness of the violation, the public harm caused by the violation, whether the violation was intentional and the financial resources of the Respondent. The violation was not gravely serious and only extended to the two lawsuits begun against the Charging Parties. The potential public harm was great, since such lawsuits could have a chilling effect on the reporting of suspected Human Rights Act violations. However, given the prompt reaction by the Department, the actual public harm is minimal. The violation was clearly intentional, since the Respondent proceeded over the warning of the Department, the express language of the statute and the apparent lack of facts to sustain the civil action. The financial resources of the Respondent are more than ample to pay the civil penalty imposed. A civil penalty of $500.00 is appropriate considering these factors.

J.L.L.